DANIEL M. PETROCELLI (S.B. #97802)
dpetrocelli@omm.com
DREW E. BREUDER (S.B. #198466)
dbreuder@omm.com
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, CA 90067-6035
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

THEODORE J. BOUTROUS JR. (S.B. #132099)
tboutrous@gibsondunn.com
NATHANIEL L. BACH (S.B. #246518)
nbach@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Facsimile: (213) 229-6804

Attorneys for Home Box Office, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OPTIMUM PRODUCTIONS, a California corporation; and JOHN BRANCA and JOHN MCCLAIN, in the respective capacities as CO-EXECUTORS OF THE ESTATE OF MICHAEL J. JACKSON,

Plaintiffs,

v.

HOME BOX OFFICE, a Division of TIME WARNER ENTERTAINMENT, L.P., a Delaware Limited Partnership; HOME BOX OFFICE, INC., a Delaware corporation; DOES 1 through 5, business entities unknown; and DOES 6 through 10, individuals unknown,

Defendants.

Case No. 2:19-cv-01862-GW-PJW

Hon. George H. Wu

HOME BOX OFFICE, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ARBITRATION

Hearing Date: May 23, 2019
Hearing Time: 8:30 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

I. INTRODUCTION

Optimum Productions and John Branca and John McClain, in their capacities as co-executors of the Estate of Michael Jackson, (collectively, "Petitioners") ask this Court to order arbitration of a poorly disguised and legally barred posthumous defamation claim against Home Box Office, Inc. ("HBO") that arises from HBO's exercise of its First Amendment rights to exhibit an expressive work on an issue of public concern—the documentary *Leaving Neverland*. Petitioners' purported basis for their claims is a single non-disparagement sentence buried in a confidentiality rider to a more than 26-year-old expired and entirely unrelated contract. Petitioners' effort to "publicly" arbitrate these issues appears to be part of a transparent effort to bolster their publicity campaign against the documentary, but that undertaking is as poorly conceived as the claims themselves.

Petitioners' Motion to Compel Arbitration ("Motion") fails for three separate and independent reasons: (1) there are no remaining rights to enforce under the expired 1992 Agreement, (2) even if any enforceable rights still exist in that Agreement, the claims Petitioners attempt to make here are not arbitrable, and (3) enforcing the Agreement as Petitioners seek to do in this situation would violate HBO's constitutional rights and numerous public policies. The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), confirms that these are issues to be decided by this Court, not an arbitrator, and this Court should deny Petitioners' Motion. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.").

II. RELEVANT FACTUAL BACKGROUND

HBO owns and operates the HBO premium pay television service, which today contains over 3,000 hours of curated content, including among other things original series, films, documentaries, and concert specials. HBO offers some of the most innovative, honored, and critically respected programming on television. In

1992, that included the one-time exhibition of a concert special presenting Michael Jackson's performance during the Bucharest stop on his *Dangerous* world tour.

More than 26 years later (and nearly a decade after Mr. Jackson's death), *Leaving Neverland* premiered on HBO. *Leaving Neverland* tells the personal stories of two individuals who allege that as young boys they were sexually abused by Mr. Jackson for years. *Leaving Neverland* premiered on HBO on March 3, 2019, in the midst of a nationwide cultural debate about sexual abuse and harassment, and whether such misconduct had for too long been tolerated or suppressed in favor of protecting the wealthy, famous, and powerful.

Petitioners and those who profit from Mr. Jackson's legacy have vociferously criticized *Leaving Neverland*, as is their right under the First Amendment (just as it is HBO's right to exhibit this newsworthy documentary). As part of Petitioners' public relations campaign against *Leaving Neverland* and its subjects, they have demanded that HBO shelve the documentary because, among other things, the filmmakers allegedly did not seek to tell Mr. Jackson's side of the story (which of course they had no obligation to do). Petitioners also, through their Motion, are attempting to revive a long-expired July 22, 1992, agreement between Home Box Office, a division of Time Warner Entertainment Company, L.P. ("TWE," which is not the same entity as Defendant HBO) and TTC Touring Corporation ("TTC," which is not the same entity as Petitioner Optimum Productions) (the "1992 Agreement") in an effort to bring an otherwise barred posthumous defamation claim against HBO.[1]

On July 22, 1992, TWE and TTC (alleged predecessors to HBO and Optimum Productions, respectively) entered into a contract relating to the production and exhibition of a program featuring Mr. Jackson's 1992 live concert performance in Bucharest, Romania. *See* Dkt. 18, Ex. B. TTC granted TWE a

[1] Petitioners allege that the parties to this action are the successors to the original contracting parties. For purposes of this motion only, HBO does not contest that Petitioner Optimum Productions is the successor to TTC.

license to exhibit the program "one time only" on October 10, 1992, "and at no other time." *Id.* at 2. In consideration for these rights, TWE paid TTC a license fee, the last portion of which was to be delivered within five days after the delivery of the program to TWE (with delivery no later than October 8, 1992). *Id.* at 1–2. The longest any performable rights or obligations lasted under the 1992 Agreement was through the "Holdback Period"—defined as the 12-month period immediately following the October 10, 1992, exhibition date. *Id*. at 2, 5–6. Therefore, after the conclusion of the Holdback Period on October 10, 1993, the Agreement was fully performed, and HBO is unaware of any specific acts performed by TWE, HBO, TTC, or Mr. Jackson under the 1992 Agreement at any time since the expiration of the Holdback Period. *See* Declaration of Stephanie Abrutyn ("Abrutyn Decl.") ¶ 2.

As is customary when "backstage" access to a "top tier" musical artist is provided in connection with producing a concert special, the 1992 Agreement incorporated a confidentiality rider as an addendum to the main contract (the "Confidentiality Provisions"). The non-disparagement sentence that is the linchpin of Petitioners' underlying claims is part of the Confidentiality Provisions.

Leaving Neverland screened at the Sundance Film Festival in January 2019. It then premiered on HBO on March 3 and 4, 2019 (as a two-part documentary). The documentary was developed and is owned by Amos Pictures, Ltd., which is not a party to this lawsuit, and was licensed to HBO for distribution in the United States, Canada, and Bermuda. Abrutyn Decl. ¶ 3. The film presents the stories of two men, Wade Robson and James Safechuck, who allege Mr. Jackson sexually abused them as children, and tells their accounts from the survivors' point of view, including the lasting impact of the abuse on their lives. The documentary has ignited important conversations and reckonings in the public and media regarding Mr. Jackson and survivors of child abuse.

Petitioners have waged a very public campaign against Mr. Robson, Mr. Safechuck, and the film. For example, they released their own film to respond to

the allegations in the documentary.[2] Petitioners' campaign against *Leaving Neverland* appears to have kicked off in earnest shortly after the film premiered at the Sundance Film Festival, when Petitioners' lawyer sent a ten-page letter to HBO, on February 7, 2019. The letter contained a litany of complaints about *Leaving Neverland*, attacking its subjects as liars, protesting that the Estate was not given an opportunity to tell its side of the story, calling HBO's former CEO "naïve," and ultimately lamenting that HBO's role in the documentary "is just plain sad." Dkt. 18, Ex. A, at 2–5. Petitioners raised additional non-legal grievances about *Leaving Neverland*, including that "[t]he usual checks on filmmakers are ethical and normative ones," and claiming that HBO "no longer cares" about such norms. *Id.* at 4. Notably, Petitioners' February 7 letter—signed and presumably written by their counsel in this case—did not once mention the 1992 Agreement, nor did it mention any actual legal claims the Estate believed it had against HBO. Rather, the letter simply requested that HBO reconsider its decision to exhibit the documentary. *See id.* at 10 (offering "to meet with HBO" and present "further information and witnesses" to counter Mr. Robson's and Mr. Safechuck's accounts).

While the February 7 letter does not specifically reference any alleged claims under the 1992 Agreement, the letter indirectly acknowledges the Agreement's existence and the concert special that was its subject. *See id.* at 9 ("the once great HBO—*who had partnered with Michael* to immense success" (emphasis added)). Petitioners also did not mention the prospect of arbitration in their February 7 letter.

Thereafter, while still conceding they cannot maintain a defamation claim—even though the crux of their claims is that the film allegedly presents a false and defamatory picture of Mr. Jackson—Petitioners seized on a single sentence contained in the 1992 Agreement that they erroneously assert enables them to avoid

---

[2] *See* Michael Saponara, *Michael Jackson's Family Defends Singer in New Documentary 'Investigating Neverland'*, Billboard, Apr. 5, 2019, https://www.billboard.com/articles/columns/hip-hop/8505847/investigating-neverland-documentary-michael-jackson.

the black-letter bar on posthumous defamation claims. However, Petitioners did not follow the usual path for pursuing arbitration. Rather than contacting HBO to initiate arbitration, instead, on February 21, 2019, just prior to the premiere of *Leaving Neverland* on HBO, Petitioners filed their public Petition to Compel Arbitration in Superior Court for the County of Los Angeles, citing the 1992 Agreement's non-disparagement sentence and seeking a "*public* arbitration" of their claims. Dkt. 1-1 ¶ 73. Only on March 5, two days after *Leaving Neverland* premiered on HBO, did Petitioners write to HBO to ask whether it would agree to arbitrate. *See* Abrutyn Decl. ¶ 4, Ex. A.

Moreover, to this day, Petitioners have not alleged—because they cannot—that any information (confidential or otherwise) obtained by HBO during the course of its performance of the 1992 Agreement was used in *Leaving Neverland*. *See* Dkt. 18, Ex. B (Ex. I, at 1) (purporting to bar the use of "Confidential Information" obtained "*[p]rior to and/or during* HBO's contract or relationship with [TTC]" (emphasis added)).

III. ARGUMENT

Under the FAA, the Court must make two findings before it may order this dispute to arbitration: first, it must determine whether a valid agreement to arbitrate exists, and, second, if it does, it must determine whether that agreement encompasses the dispute at issue. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4). Only if "the response is affirmative on both counts" does the FAA "require[] the court to enforce the arbitration agreement in accordance with its terms." *Id.* Here, the 1992 Agreement was fully performed and terminated, and therefore there is no existing enforceable agreement for Petitioners to arbitrate. And, even assuming it were still valid, the 1992 Agreement is both inapplicable to the instant dispute and unenforceable against HBO in these circumstances, as HBO's exhibition of *Leaving Neverland* is protected by the First Amendment and California public policy.

A. The Court Determines the Gateway Issues of Validity and Arbitrability.

After filing their Petition *in court* and seeking *this Court's* permission to arbitrate, Petitioners now claim that the Court must refer questions regarding the validity of the 1992 Agreement and the arbitrability of Petitioners' claims to an arbitrator. *See* Mot. at 4–5. Petitioners are wrong. Under the FAA, the Court must make these two gateway determinations. First, the Court must determine whether the arbitration agreement being invoked is valid and enforceable. *Henry Schein, Inc.*, 139 S. Ct. at 530 ("[B]efore referring a dispute to an arbitrator, *the court* determines whether a valid arbitration agreement exists.") (emphasis added). Second, the Court must determine whether Petitioners' underlying claims are arbitrable. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate [a particular dispute] is to be decided *by the court*. . . ." (emphasis added)). Petitioners' attempt to avoid consideration of these two threshold questions so that they may avoid judicial scrutiny of their disguised defamation claim must be rejected. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("To immunize an arbitration agreement from judicial challenge . . . would be to elevate it over other forms of contract." (internal quotations omitted)).

1. The Court Must Determine the Validity of the 1992 Agreement.

The Court is tasked with deciding HBO's challenge to the validity of the underlying agreement to arbitrate, in the first instance. Only if the Court finds the agreement valid and enforceable in the circumstances presented here may the Court permit an arbitration to proceed. *See* 9 U.S.C. § 4 ("[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court* shall make an order directing the parties to proceed to arbitration[.]") (emphasis added); *Rent-A-Center*, 561 U.S. at 71 ("If a party challenges the validity under § 2 [of the FAA] of the precise agreement to arbitrate

at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4."). The Supreme Court confirmed this important role for the court in two opinions rendered this very term. *See Henry Schein, Inc.*, 139 S. Ct. at 530; *see also Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275, at *6 (U.S. Apr. 24, 2019) ("[W]e presume that parties have *not* authorized arbitrators to resolve certain 'gateway' questions, such as 'whether the parties have a valid arbitration agreement at all[.]'" (citation omitted)).

2. The Court Must Then Determine Whether Petitioners' Claims Are Arbitrable.

The Court also must determine if the claims at issue are arbitrable, unless the parties have clearly and unmistakably manifested their intent to have an arbitrator determine his or her own jurisdiction. *See AT&T Techs., Inc.*, 475 U.S. at 649 ("Unless the parties ***clearly and unmistakably*** provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court. . . ." (emphasis added)); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) (confirming that "there is a presumption that courts will decide which issues are arbitrable"). Because the 1992 Agreement does not "clearly and unmistakably" confirm that HBO and TTC intended to delegate the issue of arbitrability, that determination also rests with this Court. *AT&T Techs., Inc.*, 475 U.S. at 649.

Petitioners argue that an arbitrator must decide questions of arbitrability because the 1992 Agreement calls for application of the rules of the American Arbitration Association ("AAA"), which *currently* state that an "arbitrator shall have the power to rule on his or her own jurisdiction. . . ." Mot. at 5. However, the applicable version of the rules is that which existed *at the time of the contract*. *See, e.g.*, *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1012 (N.D. Cal. 2011) (finding clear and unmistakable agreement to have arbitrator decide arbitrability only when looking at AAA rules "*as they existed at the time*" the parties "*entered into their contract*" (emphases added)). Here, the version of the AAA rules in effect in 1992

is different from the current rules, and does not contain the provision relied on by Petitioners that an arbitrator can rule on his or her own jurisdiction. In fact, the 1992 AAA rules are completely silent on this topic. *See* Declaration of Nathaniel L. Bach ("Bach Decl.") ¶ 2, Ex. A. This omission is particularly noteworthy because the Supreme Court announced its rule requiring "clear and unmistakable" evidence of the parties' intent to delegate arbitrability in 1986 (in *AT&T Techs., Inc.*, 475 U.S. 643), and the parties were therefore contracting against that backdrop when they executed the agreement in 1992. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989) ("[P]arties to a contract are 'presumed to know and to have had in mind' all laws in effect at the time they enter into that contract[.]" (quoting *Alpha Beta Food Markets v. Retail Clerks Union Local 770*, 45 Cal. 2d 764, 771 (1955))). Because the 1992 Agreement lacks such clear and unmistakable language, Supreme Court precedent—recent and from the decade around the formation of the 1992 Agreement—dictates that arbitrability issues are to be decided by the Court.

Moreover, the language of the 1992 Agreement, which Petitioners ignore, also indicates that the parties contemplated that a *court*, not an arbitrator, would determine issues relating to the Confidentiality Provisions, including the non-disparagement sentence:

> In the event that either party to this agreement brings an action to enforce the terms of these confidentiality provisions or to declare rights with respect to such provisions, the prevailing party in such action shall be entitled to an award of costs of litigation . . . in such amount as may be determined by ***the court having jurisdiction*** in such action.

Dkt. 18, Ex. B (Ex. I at 3) (emphasis added). In other words, the Confidentiality Provisions expressly contemplate that any disputes will be heard by a court; there is no mention of arbitration at all. This language, by itself, confirms that an arbitrator does not have the authority to enforce the Confidentiality Provisions. When read against the limited arbitration provision of the 1992 Agreement and the version of

the AAA Rules in effect in 1992, at a bare minimum this language creates ambiguity as to whether an arbitrator or court would have authority to hear such dispute, and as to who has the authority to determine arbitrability in the first instance. That ambiguity is fatal to Petitioners' contention that an arbitrator should make that determination.

Just last week, on April 24, 2019, the Supreme Court confirmed that it "refus[es] to infer consent when it comes to . . . fundamental arbitration questions." *Lamps Plus*, 2019 WL 1780275, at *6. Specifically, the Supreme Court reiterated and endorsed its precedents requiring clear and unmistakable evidence of consent to delegate the issue of arbitrability to an arbitrator instead of a court:

> [W]e presume that parties have *not* authorized arbitrators to resolve certain "gateway" questions, such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence *or* ambiguity" in their agreement, because "doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

Id. (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995)). Because the parties to the 1992 Agreement did not clearly and unmistakably manifest their intent for an arbitrator to determine jurisdiction regarding disputes over the Confidentiality Provisions, the Court retains that role. *Id.* at 7 ("arbitration is a matter of consent, not coercion" (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)) (internal quotation marks omitted)); *see also First Options*, 514 U.S. at 944–45 (ambiguities as to delegation of arbitrability are resolved in favor of court adjudication). And, indeed, Petitioners here apparently believe so as well, having filed their original Petition to Compel Arbitration *in*

court.[3]

B. The 1992 Agreement Is Terminated and No Valid Agreement Exists Upon Which to Arbitrate Petitioners' Claims.

Petitioners conveniently gloss over the first issue to be decided by the Court—the validity of the 1992 Agreement—wrongly claiming that there is no dispute as to the existence of a contract. *See* Mot. at 5.[4] However, it is not the past existence of a contract that is at issue under the FAA, but rather the *current* existence of a valid contract and applicable arbitration provision that may be enforced as between the parties to the litigation. *See Henry Schein, Inc.*, 139 S. Ct. at 530. Here, the Court cannot skip past this important step because the fact that the 1992 Agreement has been fully performed and is expired is fatal to Petitioners' Motion.

1. The 1992 Agreement Was Fully Performed and Has Therefore Terminated.

Under California law, a contract that has been fully performed by both

[3] As this Court undoubtedly is aware from its experience, typically defendants, not plaintiffs, seek to divest the court of jurisdiction by invoking a contractual arbitration provision and arguing the arbitrator should determine arbitrability. In that scenario, the party seeking arbitration did not control where the action was originally filed. Here, however, Petitioners made the tactical choice to file this action in court to compel an arbitration, which supports and confirms that the Court holds the gatekeeping role of deciding arbitrability.

[4] Petitioners cite *Sanford v. MemberWorks, Inc.*, 483 F.3d 956 (9th Cir. 2007), for the proposition that "[i]ssues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration." *Id.* at 962. *Sanford* specifically cautioned that "the Supreme Court has not yet spoken on this issue"—however, the Supreme Court just recently confirmed, in January 2019, that "before referring a dispute to an arbitrator, *the court* determines whether a *valid* arbitration agreement exists." *Id.* at 962 n.8; *Henry Schein, Inc.*, 139 S. Ct. at 530 (emphases added). Therefore, this Court (not an arbitrator) is to consider not merely the existence of an agreement, but also its continuing validity.

parties, as the 1992 Agreement has been here, is terminated and expired. Cal. Civ. Code § 1473 ("Full performance of an obligation, by the party whose duty it is to perform it . . . extinguishes it."); *Giles v. Horn*, 100 Cal. App. 4th 206, 228 (2002) (holding plaintiffs' claims that county violated charter provisions by entering into contracts with independent contractors was moot because "the contracts [had] been fully performed and [had] expired"); *Hidden Harbor v. Am. Fed'n of Musicians*, 134 Cal. App. 2d 399, 402 (1955) (employment contract deemed expired when "fully performed by both parties" and thus had "*no vitality after its termination*" (emphasis added)). The Supreme Court also has described this expiration-after-performance rule as a generally applicable principle of contract law. *See M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015) (describing general rule that "contractual obligations will cease, in the ordinary course, upon termination of the . . . agreement" as a traditional contract principle (internal quotations and citation omitted)).

The parties to the 1992 Agreement, who are not the same parties to this action, fully performed their obligations a quarter-century ago, after the conclusion of the Holdback Period ended, on or about October 10, 1993 (one year after exhibition of the concert special). HBO exhibited the concert special one time, and in consideration thereof, paid TTC a license fee. *See* Dkt. 18, Ex. B at 2; Abrutyn Decl. ¶ 5. HBO has not exhibited the special since October 10, 1992, and it is not currently available on any HBO platform, nor has it been available since the original, one-time exhibition more than 25 years ago. *See* Abrutyn Decl. ¶ 5. The obligations under the 1992 Agreement have thus long been fulfilled, and the Agreement has terminated along with the arbitration provision therein.

Courts, not surprisingly, have specifically held that arbitration provisions expire along with their contracts. *See, e.g.*, *Just Film, Inc. v. Merchant Servs., Inc.*, No. C 10-1993 CW, 2011 WL 2433044, at *4 (N.D. Cal. June 13, 2011) ("The dead hand of a *long-expired arbitration clause cannot govern forever*." (emphasis added)

(internal quotations and citation omitted)). "Although there is a general presumption in favor of arbitrability, it *does not apply 'wholesale in the context of an expired . . . agreement* for to do so would make limitless the contractual obligation to arbitrate.'" *Id.* at *5 (emphasis added) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991)). If any other rule were to apply, one party to an ancient, long-terminated contract could commence an arbitration on any topic whatsoever, at any time, forcing another party into an arbitration that it could not have reasonably anticipated. That is precisely what Petitioners ask the Court to do here, which would be a radical and unprecedented expansion of the FAA's arbitrability standards. *See Lamps Plus*, 2019 WL 1780275, at *6 (rejecting efforts to expand FAA to compel arbitration in ways in which parties did not expressly agree). This Court should reject Petitioners' request that it take such an extreme step.

2. The Arbitration Provision and Non-Disparagement Sentence Did Not Survive Termination of the 1992 Agreement.

For a party to assert contractual rights after termination, a contract must specifically provide that such rights survive termination of the agreement. *See, e.g.*, *Selman v. FCB Worldwide, Inc.*, No. B168315, 2004 WL 2729656, at *1–2 (Cal. Ct. App. Dec. 1, 2004) (holding arbitration provision could survive contract's termination where provision specifically stated it would "survive termination of th[e] agreement"). This principle is particularly important as applied to non-disparagement and confidentiality clauses, which require specific, agreed-upon survival language to be enforceable after the contract has terminated. *See Allan Block Corp. v. Cty. Materials Corp.*, 634 F. Supp. 2d 979, 1000 (D. Minn. 2008) (dismissing plaintiff's claim that defendant breached non-disparagement provisions "months after the termination" of underlying agreements because although "a contractual provision may survive the underlying contract's expiration," there was "no language" in underlying agreements "indicat[ing] that the non-disparagement

provisions survive termination of the agreements"); *see also Am. Family Mut. Ins. Co. v. Roth*, 485 F.3d 930, 933 (7th Cir. 2007) (contract forbidding disclosure of confidential information that is not trade secret is "enforceable . . . only if the contractual prohibition is reasonable in time and scope and, specifically, *only if its duration is limited*" (emphasis added)).

The 1992 Agreement says nothing about the survival of either the arbitration provision or the non-disparagement sentence. The parties could have so provided, of course, if that was their intention. But there is simply no language in the 1992 Agreement stating that HBO agreed to be bound *for all time* from doing anything that Mr. Jackson's posthumous representatives might consider, in their subjective opinion, to be disparaging. Nowhere in the 1992 Agreement can such a perpetual prior restraint on HBO's speech be found. Nor is there any language suggesting HBO agreed to submit in perpetuity to arbitration over unforeseen and unrelated claims that might be brought decades later. Courts as a matter of policy do not interpret contracts as conferring perpetual rights unless clearly specified in the agreement. *Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1103 (1995) ("[C]onstruing a contract to confer a right in perpetuity is clearly disfavored."); *Nissen v. Stovall-Wilcoxson Co.*, 120 Cal. App. 2d 316, 319 (1953) ("A [contractual] construction conferring a right in perpetuity will be avoided *unless compelled by the unequivocal language of the contract*. (17 C.J.S. "Contracts" § 398.). A contract will be construed to impose an obligation in perpetuity *only* when the language of the agreement compels that construction." (emphases added) (internal quotations and second citation omitted)). HBO has not located a single California case where a non-disparagement clause was enforced posthumously, let alone in perpetuity. If the parties intended to enter into such an unusual agreement, it had to be explicit. Petitioners' Motion fails on this basis as well.[5]

[5] Petitioners' interpretation also belies common sense. It would mean that in exchange for the right to exhibit one concert, one time, in addition to paying a license fee, HBO agreed to restrict *in perpetuity* everyone involved in any future

Other reasons confirm why the arbitration provision and the non-disparagement sentence did not survive termination of the 1992 Agreement. For example, HBO could not have reasonably anticipated that successors to Mr. Jackson's and TTC's interests would seek to enforce the 1992 Agreement against HBO for distributing a documentary, and certainly not where the film does not contain any confidential, non-public information that HBO learned in the performance of the 1992 Agreement. Cal. Civ. Code § 1648 ("However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."). Moreover, the confidentiality rider that Petitioners seek to enforce was drafted by TTC (or Mr. Jackson's representatives), not HBO, and therefore any ambiguity regarding the survivability of the non-disparagement sentence should be read against Petitioners. *See* Abrutyn Decl. ¶ 6; Cal. Civ. Code § 1654 ("In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.").

In addition, Petitioners' (or their alleged predecessors') conduct is inconsistent with their apparent newfound belief that the 1992 Agreement is still viable. Specifically, HBO does not have in its records any notices from TTC or Mr. Jackson's representatives informing HBO that Optimum Productions was stepping into TTC's shoes regarding any alleged ongoing rights and obligations of the 1992 Agreement, nor any notices providing updated contact information for those parties pursuant to the Notice provision of the Agreement. *See* Abrutyn Decl. ¶ 7. In the 1992 Agreement, that Notice section provides that notice to TTC should be sent to

---

programming to be exhibited by HBO—be it a stand-up comic, late-night talk show host, or documentary filmmaker—from commenting on a controversial public figure. *See* Cal. Civ. Code §§ 1643 ("contract must receive such an interpretation as will make it *lawful*, operative, *definite, reasonable,* and capable of being carried into effect" (emphases added)); 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, *and does not involve an absurdity*." (emphasis added)).

Greenberg, Glusker, Fields, Claman & Machtinger with copies to MJJ Productions, Inc. ("MJJ"), via the business management firm Breslauer, Jacobson, Rutman & Sherman. *See* Dkt. 18, Ex. B at 8. But neither TTC nor MJJ is a party to this action, and neither Greenberg Glusker nor Breslauer Jacobson apparently represents any of the Petitioners. Indeed, Breslauer Jacobson no longer exists, having ceased using that same name in 1993, and fully dissolving in 2007. *See* Bach Decl. ¶¶ 3–5, Exs. B, C, D.[6] This omission is further confirmation that, prior to *Leaving Neverland*, no one, including the alleged successors to TTC and Mr. Jackson, thought the 1992 Agreement had any continuing validity.

C. Even If the 1992 Agreement Remained In Force, It Does Not Pertain to *Leaving Neverland*.

Should this Court find the 1992 Agreement (and its arbitration provision and non-disparagement sentence) remains in effect, the arbitration provision of that Agreement still would not encompass this dispute. *See Chiron Corp.*, 207 F.3d at 1130 ("court's role" involves determining "whether the agreement encompasses the dispute at issue"). The Confidentiality Provisions that contain the non-disparagement sentence specifically state that the confidentiality guidelines apply to information "acquired by HBO *in the course of HBO's contact with Licensor and Performer*," but specifically do *not* address any later-acquired information. Dkt. 18, Ex. B (Ex. I, at 1). Petitioners have not alleged that HBO obtained any information from TTC or Mr. Jackson during performance of the 1992 Agreement that was included in *Leaving Neverland*. To the contrary, the documentary was developed by a third party, Amos Pictures, Ltd., based on the stories of two men who independently and willingly provided information to the third-party filmmakers. *See* Abrutyn Decl. ¶ 3. Amos Pictures licensed the documentary to

[6] *See also* James Bates, *Defections, Merger Shake Up Closed World: Hollywood: Breakup of Breslauer, Jacobson, Rutman & Chapman Changes the Status Quo of Managers' World*, Los Angeles Times, Apr. 1, 1994, https://www.latimes.com/archives/la-xpm-1994-04-01-fi-41138-story.html.

HBO for distribution in the United States, Canada, and Bermuda. *See id.*

Petitioners do not, and cannot, allege that any information HBO obtained during the course of performing the 1992 Agreement, let alone any confidential information or trade secrets, was provided to the filmmakers. Thus, by the express language of the contract itself, *Leaving Neverland* is categorically outside the scope of the Confidentiality Provisions. *See* Cal. Civ. Code § 1650 ("Particular clauses of a contract are subordinate to its general intent."); *id.* § 1648 ("However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."). Any complaints Petitioners have about the film, therefore, are outside the scope of the 1992 Agreement and its arbitration provision. Indeed, if such a broad and problematic provision—to the extent it could ever be enforced consistent with due process, *see infra* Section III(D)—were to be read as a perpetual obligation subject to arbitration, the parties would have to have made it unambiguously clear that the provision was both so broad in scope and survived performance of the Agreement. Because they did not, Petitioners' Motion fails for this additional reason.

There is simply no basis for Petitioners' attempt to enforce the 1992 Agreement more than 26 years later over entirely unrelated events. No agreement constituting a perpetual prior restraint against HBO was ever formed, and there is no valid agreement or arbitration provision for Petitioners to enforce in connection with their complaints about the contents of the documentary. The invalidity of the arbitration provision compels denial of Petitioners' Motion. *See Henry Schein, Inc.*, 139 S. Ct. at 530.

D. The 1992 Agreement's Non-Disparagement Sentence is Unenforceable.

Petitioners' Motion must be denied for the separate and additional reason that their claims would violate HBO's constitutional rights and numerous California public policies. Therefore, even if the 1992 Agreement had not terminated and expired on its own, which it has, Petitioners' Motion still is without merit.

Arbitration agreements are subject to all defenses to enforcement that apply to contracts generally, and because the 1992 Agreement is unenforceable as applied to Petitioners' claims, there is nothing to arbitrate. *See* 9 U.S.C. § 2 (arbitration provisions shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (because "arbitration is a matter of contract" arbitration agreements "are subject to all defenses to enforcement that apply to contracts generally" (internal citations omitted) (citing 9 U.S.C. § 2)).

1. Petitioners' Interpretation of the Non-Disparagement Sentence Violates HBO's First Amendment and Due Process Rights.

The TTC-drafted Confidentiality Provisions contained in Exhibit I to the 1992 Agreement are unquestionably broad. While the provisions are first tailored to addressing and protecting "Confidential Information" obtained "[p]rior to and/or during HBO's contact or relationship with" TTC, Exhibit I goes on to purport to restrict HBO from "do[ing] *any act* that may harm or disparage or cause to lower in esteem the reputation or public image of Performer or any person, firm or corporation related to or doing business with Performer." Dkt. 18, Ex. B (Ex. I at 2) (emphasis added).

Petitioners cite this "non-disparagement provision" as evidence of the validity of their claims. Mot. at 2. In reality, the over-breadth of the language as interpreted by Petitioners—purporting to apply to "any act" that might harm Performer, in his or his heirs' subjective opinion, forever—simply confirms its invalidity. Petitioners' attempt to persuade this Court to enforce it against HBO more than 26 years later in connection with unrelated, expressive conduct further reinforces that the sentence is void for vagueness and for failure to provide HBO fair notice of the allegedly perpetual rights that TTC, Mr. Jackson, or their successors might assert against it at any time in the future. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (finding broadcaster's due

process rights were violated and noting that the "void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"); *id.* at 253–54 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *see also Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech."). Reading perpetual life into the non-disparagement sentence to enforce it decades after the 1992 Agreement was fully performed to inhibit unrelated speech by alleged successors in interest is precisely the type of overbroad and arbitrary suppression of speech that violates HBO's due process and First Amendment rights. The violation of HBO's rights is particularly acute here, where Petitioners are trying to bring a legally and constitutionally barred defamation claim disguised as a contract claim.

Separately, by asking this Court to enforce the vague and overbroad Confidentiality Provisions of the 1992 Agreement, Petitioners seek to punish the creation and exhibition of an expressive work, which would unlawfully restrict HBO's due process and First Amendment rights. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) (finding party's state law claims "impose[d] invalid restrictions on . . . constitutional freedoms of speech and press"); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others. . . ."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Therefore, the non-disparagement sentence of the Confidentiality Provisions that Petitioners rely on here is at the very

least invalid as applied to *Leaving Neverland* and, as a result, there is nothing to arbitrate.

2. The Non-Disparagement Sentence Is Unenforceable Because It Violates Numerous Public Policies.

The 1992 Agreement's non-disparagement sentence also is unenforceable on public policy grounds. While a party can waive its First Amendment rights if there is clear and convincing evidence that the waiver was knowing, voluntary, and intelligent, a waiver will not be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement" of the waiver. *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993) (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991)). Here, even assuming the non-disparagement sentence could have waived in perpetuity HBO's First Amendment rights to ever "do any act" that Mr. Jackson or his representatives might subjectively find disparaging, the interest in enforcing it to support Petitioners' claims is significantly outweighed by numerous public policies harmed by its enforcement.

First, application of the vague and overbroad non-disparagement and Confidentiality Provisions implicates and violates HBO's due process and First Amendment rights. *See supra* Section III(D)(1). As the Supreme Court has held, "[t]he vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect." *Reno*, 521 U.S. at 871–72; *Fox Television Stations, Inc.*, 567 U.S. at 253–54 ("When speech is involved, rigorous adherence to [due process notice] requirements is necessary to ensure that ambiguity does not chill protected speech.").

Second, enforcement of the non-disparagement sentence would run afoul of the constitutional and statutory limitations against defamation claims brought on behalf of deceased individuals. *See, e.g.*, *Kelly v. Johnson Publ'g Co.*, 160 Cal. App. 2d 718, 723 (1958) ("Defamation of a deceased person does not give rise to a

civil right of action . . . in favor of the surviving spouse, family, or relatives, who are not themselves defamed."). Despite conceding that they cannot maintain a defamation claim on Mr. Jackson's behalf, Dkt. 1-1 ¶¶ 66–67, Petitioners seek to do precisely that:

> Other than ethics and journalistic norms, the main check on making a "powerful documentary" with false accusations . . . is the law of defamation. And *that* is the heart of the issue.

Id. ¶ 66. Although they disguise their claims as sounding in contract, the allegations in the Petition confirm the true nature of the claims as repackaged tort claims for defamation. Petitioners, for instance, seek punitive damages, which are not available for contract claims, but are available for intentional torts (including defamation claims). *Id.* at 23 ("Petitioners further pray that the arbitrator award punitive damages[.]").

Petitioners also try to characterize HBO's conduct as an intentional tort. *See id.* ¶ 85 (alleging HBO is "*intending* to cause" damage to Mr. Jackson's legacy (emphasis added)); *see also id.* at 23 (alleging HBO "is *intending* to cause" harm to Mr. Jackson's legacy (emphasis added)). But the U.S. and California Supreme courts have repeatedly refused to allow plaintiffs to perform an end-run around the limitations on defamation claims by assigning a different label to their claim. *See, e.g.*, *Reader's Digest Ass'n, Inc. v. Superior Court*, 37 Cal. 3d 244, 265 (1984) (noting that *New York Times v. Sullivan* "defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability" that does "not depend on the label given the stated action"); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that public figures "may not recover for [intentional torts] . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'").

Applying the non-disparagement sentence to HBO's exhibition of a

documentary film regarding a deceased individual would be unprecedented for another reason: it would legitimize the creation of a special category of wealthy, powerful, or famous individuals who could—through a lifetime of contracts with news or media companies—preserve for themselves via contract posthumous control over how they are portrayed and described in a way that ordinary citizens cannot. This would run counter not only to California's policy barring claims for defamation of deceased individuals, but also California's policy disfavoring restrictions on public criticism or commentary in the form of prior restraints on speech, particularly where they suppress newsworthy information and unlawful acts. *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000) (prior restraints "are disfavored and presumptively invalid").

Third, the vague and overbroad interpretation of the non-disparagement sentence that Petitioners urge this Court to adopt would, if accepted, violate HBO's First Amendment right to distribute expressive content on an issue of public concern. These core rights of the creative community have been recognized and reaffirmed by the California Court of Appeal and the Ninth Circuit in the recent cases *De Havilland v. FX Networks, LLC* and *Sarver v. Chartier*, respectively. The Ninth Circuit reiterated that film "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016). The California Court of Appeal, expanding on *Sarver*, confirmed the critical First Amendment rights at issue:

> Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. *The First Amendment protects these expressive works and the free speech rights of their creators.*

De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 849–50 (2018)

(emphasis added), *review denied* (Cal. Jul 11, 2018), *cert. denied* 139 S. Ct. 800 (2019). The court in *De Havilland* went on to observe:

> Whether a person portrayed in one of these expressive works is a world-renowned film star—'a living legend'—or a person no one knows, *she or he does not own history*. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.

Id. at 850 (emphasis added). These bedrock First Amendment principles form the important public policy interests that override enforcement of the non-disparagement sentence against HBO in this case.

Fourth, enforcing the non-disparagement sentence to prevent publication of allegations of child sex abuse would run afoul of the public policy embodied in numerous California statutes to protect children from sexual abuse. California, for example, prohibits confidentiality provisions in settlements of civil litigation that "prevent[] the disclosure of factual information" for any acts of "childhood sexual abuse" or "sexual exploitation of a minor." Cal. Code Civ. Proc. § 1002(a)(3); *see also* Cal. Penal Code §§ 11164 *et seq.* (imposing a mandatory reporting obligation on certain individuals in cases of known or suspected child abuse or neglect).

The legislative history of these statutes makes clear the California legislature's significant concern with preventing acts of childhood sex abuse. *See* Bach Decl. ¶ 6, Ex. E (*Confidential Settlement Agreements: Sexual Offenses: Hearing on A.B. 1682 Before the Assembly Comm. on Judiciary*, 2015-2016 Leg., Reg. Sess. (Cal. 2016) (the public "has *such a strong interest* in the prosecution of individuals who commit acts of childhood sexual abuse and exploitation that the ordinarily useful tool of confidentiality provisions in settlement agreements should not be allowed in civil actions based upon those acts" (emphasis added))). Because enforcement of the non-disparagement sentence would violate this important public policy (and those set forth above), the provision is unenforceable and there is nothing for Petitioners to arbitrate.

IV. CONCLUSION

For the reasons set forth herein, this Court should deny Petitioners' Motion, find the 1992 Agreement does not contain a valid agreement to arbitrate the instant dispute, and confirm that any claim that Petitioners might seek to bring in any forum against HBO over *Leaving Neverland* based on the 1992 Agreement would not be actionable.

Dated: May 2, 2019

O'MELVENY & MYERS LLP
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

By: /s/ Theodore J. Boutrous Jr.
Theodore J. Boutrous Jr.

Attorneys for Home Box Office, Inc.